

CONCLUSION OF LAW:

Based upon the foregoing Findings of Fact, it is the conclusion of this District Environmental Commission that the project described in the application referred to above, if completed and maintained in conformance with all of the terms and conditions of that application, and of Land Use Permit #2W1012 will not cause or result in a detriment to public health, safety or general welfare under the criteria described in 10 V.S.A., Section 6086(a).

COMMISSION ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law Land Use Permit #2W1012 is hereby issued.

Dated at North Springfield, Vermont, on June 22, 1995

By: 

Robin Stern, Acting Chair  
District 2 Environmental Commission  
Environmental Board

Others participating in this decision:  
Thomas C. Spater

Any appeal of this decision must comply with all provisions of 10 V.S.A. §6069 and Environmental Board Rule 40 including the submission of ten copies of the following: notice of appeal, a statement of why the appellant believes the commission was in error, a statement of the issues to be addressed in the appeal, a summary of the evidence that will be presented, a preliminary list of witnesses and this decision. Decisions on minor applications may be appealed if a hearing was held by the district commission or timely requested by the appellant.

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EXHIBIT LIST #2W1012  
U.S. CELLULAR - CLIFFORD DUNCAN  
WILMINGTON

NO.	DATE	BY	SUBJECT
1	5/4/95	Applicant	Application Description
2	"	"	Application
2A	"	"	Revised Application
3	"	"	Schedule B
4	"	"	Water Supply and Wastewater Disposal Permit Application
5	"	"	Deferral of Permit Application
6	"	"	Municipal Impact Questionnaire
7	"	"	Location Map
8	"	"	Flood Insurance Map
9	"	"	Soils Map and Information
10	"	"	Decision of Zoning Board of Adjustment
11	"	"	Letter 2/24/95 from Brian Johnson
12	"	"	Letter 3/3/95 from Everett Marshall
13	"	"	Photos (and map) illustrating visual impact
14	"	"	Excerpts from Windham Regional Plan
15	"	"	Letter 4/10/95 from Jeffrey Kevan
16	"	"	Decision
17	"	"	Drawing of Tower
18	"	"	Equipment Information
19	"	"	Letter 3/14/95 from Chris Bernier

Exhibit List #2W1012  
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NO.	DATE	BY	SUBJECT
20	5/4/95	Applicant	Letter 3/9/96 from Eric Gilbertson
21	5/4/95	Applicant	Letter 2/27/95 from Diane Conrad
22	"	ANR	Interagency Comments (5/2/95)
23	"	"	Memo (5/1/95) from James McMenemy
24	"	"	Memo 4/28/95 from Dan Maxon
25	"	Applicant	Letter 5/1/95 from C. Allan Wright
26	"	"	Map of Proposed Land Use Windham Regional Plan
27	"	"	WW-2-0805 Permit
28	"	"	Deferral of Permit DE-2-3341
29	"	"	Letter 3/15/95 from Green Mountain Power
30	"	"	Drainage Calculation
31	"	"	Project Plans (4 sheets)
32	5/23/95	ANR	Letter 5/18/95 from Edward Leary
33	"	Applicant	Letter 5/19/95 from Jeffrey Kevan
34	"	"	Memo 5/17/95 from Jeffrey Kevan
35	"	"	Letter 5/15/95 from Neil Deegan with Attachments
36	"	"	Letter 5/11/95 from Jeffrey Kevan with Attachments
37	"	"	Letter 8/25/94 from Neil Deegan
38	"	"	Letter 8/12/94 from Joseph Fanara

CERTIFICATE OF SERVICE

#2W1012

I, April Hensel, hereby certify that I sent a copy of the foregoing findings and permit on June 22, 1995, by U.S. Mail, postage prepaid, to the following:

United States Cellular  
288 Route 101  
Bedford, NH 03110

Clifford & Diana Duncan  
P. O. Box 685  
Wilmington, VT 05363

Cellular One  
3 Baldwin Avenue  
So. Burlington, VT 05403

Robert & Reatha Southworth  
RR 1, Box 202  
Wilmington, VT 05363

Robert Kazakiewicz  
P. O. Box 77  
W. Wardsboro, VT 05360

Paul M. Brown  
RD #2, Box 157A  
W. Brattleboro, VT 05303

Richard Craig  
LeRoy Womacke  
1233 Shelburne Road SE6  
So. Burlington, VT 05403

Dan Purjes  
Skyline Partners  
Box 190  
Wilmington, VT 05363

Clyde Reed  
Skyline Partners  
HCR 13, Box 50  
Jacksonville, VT 05342

Wilmington Bd. of Selectmen  
Ms. Ann Manwaring  
P.O. Box 217  
Wilmington, VT 05363

Wilmington Town Planning  
Ms. Barbara Cole  
P.O. Box 217  
Wilmington, VT 05363

Certificate of Service #2W1012  
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Marlboro Bd. of Selectmen  
Attn: Woody Bernhard  
P.O. Box E  
Marlboro, VT 05344

Marlboro Town Planning  
Mr. Pieter H. vanLoon  
P.O. Box E  
Marlboro, VT 05344

Windham Regional Commission  
139 Main St., Suite 505  
Brattleboro, VT 05301

Ed Leary, State Lands Admin.  
VT Dept. Forests, Parks  
103 So. Main St.  
Waterbury, VT 05671

Kurt Janson, Esquire  
Agency of Natural Resources  
103 South Main Street  
Waterbury, VT 05676

FOR INFORMATION ONLY

District 2 Environmental Commission  
RR #1, Box 33  
North Springfield, VT 05150


Wilmington Town Clerk  
Ms. Janice Karwoski  
P.O. Box 217  
Wilmington, VT 05363

Sonia Alexander  
Town Manager  
P.O. Box 217  
Wilmington, VT 05363

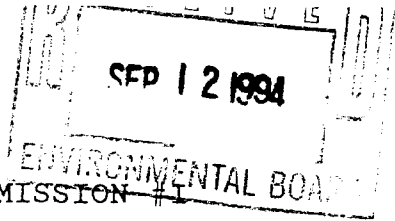
Edward Metcalf  
P.O. Box 11  
Jacksonville, VT 05342

TF Moran, Inc.  
Eric Morse  
152 Davis Street  
Keene, NH 03431

TF Moran, Inc.  
Jeff Kevan  
288 Route 101  
Bedford, NH 03110

By:   
April Hensel  
District 2 Coordinator

STATE OF VERMONT ENVIRONMENTAL BOARD  
DISTRICT ENVIRONMENTAL COMMISSION #1



Re: Atlantic Cellular Company L.P. #1R0766  
Attn: John Kelly Findings of Fact,  
15 Westminster Street Conclusions of Law and  
Suite 830 Final Decision on  
Providence, RI 02903 Criterion 10 (Town Plan)

Richard C. and Charles Heleba  
P.O. Box 85  
Center Rutland, Vermont 05736

I. INTRODUCTION

Application #1R0766 was filed by co-applicants Atlantic Cellular Company, L.P. and landowners Charles and Richard Heleba on January 25, 1994, for the construction of a telecommunications facility consisting of a 120 foot self-supporting tower, a 12 foot by 20 foot concrete equipment shelter, a generator slab with generator and a 1,000 gallon propane tank all located in a 35 foot by 51 foot fenced compound on Boardman Hill. The proposed tower and other equipment were represented in the application as being located in West Rutland, Vermont. The project is represented in the application as conforming with the West Rutland Town Plan adopted on November 9, 1992. At the first of three public hearings on this case, an adjoining landowner introduced evidence that the project was actually located in the Town of Rutland, Vermont. The Commission heard testimony that, if the tower site is in the Town of Rutland, the project would not conform with the Rutland Town Plan adopted on December 27, 1993, which designates the area as neighborhood residential (R40A) use only. Ultimately, the applicants agreed to confine Commission review of this application to Criterion 10 (Town Plan) as allowed in 10 V.S.A. §6086 (b). The Commission recessed the third and final hearing on this criterion on August 19, 1994 pending receipt of final recess memorandum requirements. Those requirements were met and the Commission adjourned the final hearing on August 26, 1994. Pursuant to the statute, the Commission hereby issues our findings and decision on conformance with Criterion 10 for Application #1R0766.

II. PARTIES

The following entities are "parties of right" under Environmental Board Rule 14(A).

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Application #1R0766

Decision on Criterion 10

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1. The Co-Applicants, Atlantic Cellular and Charles Heleba, by Peter Kunin, Esq., Richard Craig, Gregory Dicovitsky, and Robert Krebs.
2. Town of West Rutland, by Francis Flynn.
3. Town of Rutland, by Joseph Zingale and J. Barry Burke.
4. The West Rutland Planning Commission was not represented.
5. The Rutland Planning Commission, by Charles Brothers.
6. The Rutland Regional Planning Commission, not represented.
7. The State of Vermont, Agency of Natural Resources, not represented.
8. John H. Bloomer, adjoining landowner, having demonstrated that the project might have direct effects on his property with regard to Criterion 10 (Town Plan). Mr. Bloomer also requested party status under additional criteria. Because we decided, with the applicants' agreement, to confine our decision to Criterion 10, we are not ruling on party status as to other criteria. The Commission notes that in this case, if we did not find that this adjoiner was eligible for party status under Criterion 10 (as an adjoiner), we would grant party status under Rule 14 (B) for the material assistance provided to the Commission by this adjoiner under Criterion 10.

### III. BACKGROUND

As noted in prior memorandums, recess orders, and notices, a critical question involving this application has been whether the proposed project is legally situated in the Town of West Rutland - as represented in the application - or in the Town of Rutland.

The issue is important because the District Commission is obligated by statute to review applications for conformance with the Town Plan (Criterion 10). In this case, the Commission received conflicting evidence. The applicant submitted evidence of historical efforts to locate and to monument a municipal boundary line. The Commission reviewed two separate survey reports, one commissioned by the two towns in 1988, and the second being a report by the applicant's surveyor of his attempts to locate the boundary in 1994. Both surveyors concluded in summary, that "none of the written evidence has a description that can be reproduced with any absolute certainty on the ground" (Exhibit 57c p. 2, 1994).

The Commission also reviewed evidence submitted by an adjoining landowner that the Town of West Rutland, created by the Vermont Legislature on November 19, 1886, was legally comprised of School Districts 6, 7, 8, 9, 21, and the so-called central district. Graphic evidence of the location, on paper, of the school district line between District 21 or 7 (West Rutland) and District 12 (Town of Rutland) was limited to an 1869 copy of Beers Atlas for Rutland County. Other evidence of the school district division line was contained by inference, in a cronoflex prepared by the State Agency of Transportation, a survey map prepared by the U.S. Geological Survey, and in a survey plan prepared by the applicants' expert.

It is not the Commission's duty or obligation to establish the legal location of the projects we review. That burden is upon the applicant under 10 V.S.A. §6088(a). Nor is it the Commission's duty to establish municipal boundary lines. That is solely within the power of the legislature or courts. The Commission takes administrative notice of the statutory remedies available to municipalities where the boundary line is uncertain or subject to disagreement - see 2 V.S.A. §17 (Petition to General Assembly) and 24 V.S.A. §1461 (Petition to Superior Court).

In this case, the Commission notes five factors of particular relevance to our finding in this case:

1. The legislature created the Town of West Rutland in 1886 which, by definition, was made up of certain school districts.
2. The only graphic evidence (map) naming the school districts specifically, is the 1869 Beers Atlas for Rutland County.
3. The applicants' expert identified at least four possible locations of the municipal boundary line. From west to east, those possible lines are:
  - a. The school district line as it appears in the Beers Atlas.
  - b. The Town Line based on Boardman farm descriptions.
  - c. The Town Line tracking on two marble monuments located on either side of the State's Route 4 project.
  - d. The Town Line as generally described in the Rutland Herald in 1886, when the Town of West Rutland was created.



The applicants' expert rendered his opinion that Town Line (c) above is "probably the most probable location" of the line. (Exhibit # 57c, p. 5)

4. The project, if located in West Rutland, would conform with the Town Plan. The project, if located in the Town of Rutland, would not conform with the Town Plan's designation for residential use only.
5. As a matter of law, "acquiescence in a wrong boundary line, whatever its duration, will not change the true division line established in the legislative grant" (10 V.S.A. §1461 - annotation citing Brookline v. Town of Newfane 126 VT 179 (1966)).

#### IV. DECISION

The Commission finds that the legal boundary line between the municipalities of the Town of Rutland the West Rutland cannot be located. The proposed project appears to be located very close to a possible location of the line if the two towns take the steps necessary to establish and monument their boundary line. The applicant requested that the Commission make a decision on conformance with Criterion 10.

Our decision is that the evidence of Conformance with Criterion 10 is insufficient as to which municipality the project is sited. Therefore, the permit is denied for failure to provide evidence sufficient for this Commission to find affirmatively with respect to conformance with Criterion 10.

Under 10 V.S.A. §6088, the applicant has the burden of proof on Criterion 10. We hereby incorporate by reference in this decision our Hearing Recess Order #2 dated April 29, 1994. In that Order, we required "evidence sufficient to conclude that the project applied for is legally located in one town or the other without engaging in undue speculation" (Recess Order #2, pp. 2-3) (emphasis added), see also Washington Electric Cooperative, Inc. Findings of Fact, Conclusions of Law and Order #5W1035-EB dated December 19, 1980).

As noted in prior statements by Acting Chairman Charles Shortle and in prior written orders, the Commission has no authority to establish a municipal boundary line. In this case, the Commission gives considerable weight to the conclusion of surveyor Peter Chase who informed the Towns in 1988 that "no written description or graphic representation was found whereby the boundary line in question can be located or surveyed on the ground with any degree of accuracy" (Exhibit #52a, p. 1). The Commission also assigns significant weight to the applicants' own surveying

expert, Mr. Krebs, whose report concludes, among other things, that "none of the written evidence has a description that can be reproduced with any absolute certainty on the ground" (Exhibit 57c, page 2).

The applicants argue that their provision of tax records, surveying data, deed descriptions, town meeting notes, and appraisal records establishes the project site as being in West Rutland, Vermont by a preponderance of the evidence. The Commission finds, however, that the applicant has collected evidence relevant to establishing the line under 2 V.S.A. §17 or 24 V.S.A. §1461, but that the preponderance of the evidence in the case before this Commission - including the two professional survey reports cited above - is that the location of the legal boundary cannot be determined.

The Commission concludes that a boundary line which cannot be located on the ground by professional surveyors is no boundary line at all. For this Commission to take the "best guess" approach apparently taken by state and municipal bodies in the past would be to engage in undue speculation when reviewing this project for conformance with Criterion 10 (Town Plan).

At the third and final hearing on this matter, the applicants' surveyor Mr. Krebs, introduced new evidence including town meeting notes, an appraisal, and Mr. Krebs' assertion that the "central district" may have included District 12. The Commission finds that this evidence further clouds the boundary issue and is not helpful to our resolution of this matter. Finally, the applicant presented a legal memorandum "Regarding Legal Standards Applicable to Determination of Whether Project is in West Rutland or Rutland." (Exhibit #63). This memo raises issues which the Commission will address as follows:

1. Applicant asserts that his evidence is directly relevant to where the legislature intended the line to be. We agree. As noted above, we believe that applicant's information will be found relevant to the Superior Court or Legislature's resolution of this boundary line issue.

The applicants' surveyor found evidence of at least four prior line locations or descriptions. Moreover, the two towns hired a surveyor in 1988 to help them try to find the line. The applicant has conceded that the legislature created the Town by reference to school districts, but the applicant's expert surveyor stated at the third hearing that he found evidence that the school districts were changed frequently over the years. If the Town of West Rutland is made up of School Districts, presumably the only school district boundaries relevant to this issue are those in existence on November 19,

1886 - the day the Legislature created West Rutland. Otherwise, the boundary would change every time a school district changed, and neither School Boards or District Commissioners have the authority to change municipal boundary lines. In summary, the Commission believes that the line cannot presently be located on the ground. If the Town's have engaged in "acquiescence long endured," then this Commission would not expect to have seen evidence of at least four possible line locations, or an attempt by the Town of Rutland to tax the parcel, or the hiring of a surveyor by the two towns in 1988 to see if their line could be found.

2. Because the Commission finds that the 1988 survey alone is sufficient evidence of lack of "acquiescence long endured," we do not reach the applicant's second argument that "acquiescence alone can be dispositive in establishing a boundary line."
3. The applicants' third argument is that the "applicant need not prove the location of the line exactly according to the charter." The applicant then cites language from the Supreme Court which allows the line to be located "as nearly according to the charter as it reasonably can be" (Town of Searsburg v. Town of Woodford 76 Vt 370 (1904)). This case predated the enactment of Act 250 (1970). The clear meaning of the Supreme Court in Searsburg is not that Act 250 projects can be subject to undue speculation, but that municipalities are obligated to locate their line as nearly according to the charter as it can reasonably be. The Commission believes that this will be helpful to the Towns when they get their line established by the proper procedures available to them under the law.

#### V. CONCLUSION

Until such time as the Town of Rutland and the Town of West Rutland formally establish and monument their boundary line, the location of the proposed communications tower will remain in doubt. The applicant was obligated to prove to the Commission in this case that the project was in fact and in law located in West Rutland and that the tower could be built in that location under West Rutland's Town Plan (Criterion 10).

We find that the applicant has failed to produce evidence of the project's location sufficient to avoid undue speculation by the District Commission. This difficulty is compounded by the proximity of the project with the various possible lines, and by the fact that we would not find conformance if the project site is found to lie in the Town of Rutland.

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Under these circumstances the Commission cannot find affirmatively with respect to Criterion 10, and this application is denied.

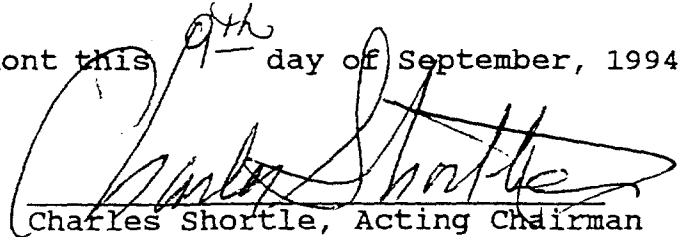
The Commission acknowledges the serious effort by the applicants to find the legal line. We greatly appreciated that effort and believe that the landowners, the applicants, and prior state and local administrators have suffered for lack of a clear boundary line for over 100 years.

To put this issue to rest, the Commission encourages the municipalities in question to seize this opportunity to locate, monument and legally establish their municipal boundary line.

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Dated at Pittsford, Vermont this <sup>9<sup>th</sup></sup> day of September, 1994.



Charles Shortle, Acting Chairman

District #1 Environmental Commission

Charles Shortle, Acting Chairman  
Anne DeBonis  
Warren Crawford

By: William Burke  
District Coordinator

ATLANTIC CELLULAR COMPANY, L.P.  
APPLICATION #1R0766

EXHIBIT LIST

1. Letter from Dicovitsky, Development Consultants Inc., 1/25/94, Re: Application Submittals
2. Application
3. Schedule B
4. Project Location Map, Boardman Hill Road
5. Sketch Showing Telecommunications Line
6. Cover Sheet, Atlantic Cellular, Boardman Hill, Vermont, Cell Site
7. Vicinity and Location Maps, 7/8/93
8. Graphic Standards, 1/27/92
9. Plot Plan - Partial, 7/12/93
10. Plot Plan - Partial, 7/12/93
11. Plot Plan - Partial, 7/12/93
12. Plot Plan - Partial, 7/12/93
13. Compound Area Plan, 7/9/93
14. Fencing Details & Specifications, 1/24/92
15. Fencing & Access Road Details, 1/24/92
16. Equipment Shelter Foundation Plan, 1/24/92
17. Coax Cable/Antenna Orientation Detail, 4/14/93
18. Power/Telco Details, 1/24/92
19. Waveguide Bridge Details
20. Propane Tank Concrete Pad & Misc Details, 7/23/93
21. Exterior Grounding Details - Equipment Shelters, 4/10/93
22. Exterior Grounding Details, Waveguide Bridge Details, 3/25/93
23. Exterior Grounding Details, 3/25/93
24. Exterior Grounding Details, 3/25/93
25. Alternative Grounding Methods, 6/23/93
26. Ice Bridge Detail for Propane Tank, 7/23/93
27. Tower Profile, 8/5/93
28. Construction Means and Methods, Boardman Hill Vermont
29. Municipal Impact Questionnaire
30. Equipment Shelter Description
31. Letter from Marshall, Nongame and Natural Heritage Program, 12/29/93, Re: No Rare or Irreplaceable Natural Areas or Endangered Species
32. Specifications of Air Conditioner, Marvair
33. Letter from Philbrook 12/27/93, Re: No Significant Impact On Forest Soils
34. Memorandum of Lease, 7/27/93
35. Major View Shed Orientation
36. West Rutland Board of Adjustment Findings of Fact, Conclusions and Resolution, Granting the Conditional Use Permit, 1/14/94
37. Zoning Ordinance Map, Town of West Rutland, Adjoining Property Owners Penciled In
38. Sketch of Boardman Hill Road Area, Submitted by Joe Zingale, Town of Rutland, at 1st. Hearing, 3/14/94
39. Letter from Agency of Transportation, 2/16/94, Project Should Be Addressed by Town Officials
40. Letter from Scott Darling, Fish and Wildlife, 3/7/94, Re: No Impact on Critical Wildlife Habitat
41. Letter from John Bloomer, 2/14/94, Re: Notice of Appearance on Atlantic Cellular Hearing, 2/14/94
42. Motion for Continuance, John Bloomer, 2/21/94, Re: Request for Hearing Set for 2/24/94 be Postponed



- 43. Letter from Dicovitsky, 2/22/94, Re: Two Additional Exhibits, and Comments on Stuart Slote's Recommendations
- 44. Memorandum from Stuart Slote, 1/24/94
- 45. Letter from CVPS, 2/4/94, Re: Capacity to Serve Project
- 46. Confirmation that Applicant Waives its Right to a Hearing Within 40 days of Submission of Application, 2/22/94
- 47a. Letter from Dicovitsky to Peter Kunin, 3/11/94, Re: Question on Location of Boundary Line
- 47b. Deed for Heleba Property, 3/27/74, Charles Heleba to Irene M. Hughes
- 47c. Warranty Deed, Boardman, 5/1/1901, Charles H. Boardman to Edward P. Gleason
- 47d. Grant Boardman, Administrator of Estate of Edward P. Gleason, 4/25/1927
- 47e. Tax Bill for WNYT-TV Tower; 7/2/93, Town of West Rutland
- 48. Letter from Zingale, Town of Rutland, 3/23/94, Re: Recess Order Request
- 49a. Letter from Yennerell, Town of West Rutland, 3/31/94, Re: Recess Order Request
- 49b. Warranty Deed, Heleba Property, 3/27/74, True Copy, Attest Jayne Pratt, West Rutland Town Clerk
- 49c. Warranty Deed, Anna Heleba to Charles and Mary Heleba, 5/5/47, True Copy, Attest Jayne Pratt, West Rutland Town Clerk
- 49d. Quit Claim Deed, Irene Hughes to Charles W. Heleba and Richard C. Heleba, 3/27/74
- 49e. Warranty Deed, Grant Boardman, Administrator of Estate of Edward P. Gleason, 4/25/1927
- 49f. Warranty Deed, Charles Boardman to Edward P. Gleason, Town of West Rutland, 5/1/1901
- 49g. Grand List, Town of West Rutland, 1902
- 49h. Grand List, Town of West Rutland, 1894
- 50a. Letter from Peter Kunin, 4/8/94, Re: Response to Recess Order of 3/15/94
- 50b. Tax Bills From Town of West Rutland Showing that the Boardman Hill Property is Taxed by Town of West Rutland
- 50c. Statement from Richard F. Oberman, L.S., Explaining his Basis for Stating that Property is in West Rutland, 4/7/94
- 50d. Copy of Mr. Oberman's Land Surveyor License, 10/1/1992
- 50e. Board of Adjustment Resolution on Appeal Request, 9/28/82, Granted Permit to WNYT Channel 13 Tower
- 51a. Letter from John Bloomer, 4/11/94, Re: Response to Recess Order of 3/15/94
- 51b. Copy of Map of Town of Rutland from Beers' 1869 "Atlas of the County of Rutland"
- 51c. Copy of Public Act No. 138, Entitled, "An Act to Incorporate the Town of West Rutland," 11/19/1886, Vermont Legislature
- 52a. "Report on Research of the Mutual Boundary Line Shared by the Towns of Rutland and West Rutland," Peter E. Chase, 12-29-88
- 52b. Inspection Report, Heleba Property, 2/16/88
- 52c. Letter from DelBianco, Rutland Town Clerk, 4/25/94, Certifying Charles Heleba Property Appeared on 1987 Rutland Town Grand List, and the Taxes Paid
- 52d. Tax Bills, Rutland Town, 1987, 1993
- 52e. Grant Boardman, Administrator of Estate of Edward P. Gleason, 4/25/1927
- 52f. Warranty Deed from Charles W. Heleba to Irene M. Hughes, 3-29-74

53. Letter from J. Barry Burke, 4/19/94, Stating that Charles Heleba Property Never Listed on Rutland Town Grand List During his Tenure as Lister 1968-1994.
54. Copy of Subpoena of J. Barry Burke, Signed Charles Shortle, 4/20/94
- 55a. Letter from Kunin, 4/26/94, Re: Argument of Sufficient Information; Preponderance of Evidence; Is Parcel in Question in Town of Rutland or West Rutland?
- 55b. Supporting Document to 55a, Pratt's Propane #3R0486-EB, 1/27/87
- 55c. Supporting Document, Brookline v. Newfane, 126 Vt. 179, 183 (1966)
- 55d. Supporting Document, Washington Electric Cooperative, Inc., 5W1036-/EB, 12/19/90
- 55e. Supporting Document, 24 V.S.A. § 1462, Chapter 47. Town Lines
56. Letter from Kunin, 5/27/94, Re: Request for Additional Time to Submit Evidence as Required by Hearing Recess Order No. 2
- 57a. Letter from Kunin, 6/30/94, Re: Summary Report by Robert C. Krebs, and Map
- 57b. Map, "Composite Map to Accompany Report," 6/30/94
- 57c. "Report on a Portion of the West Rutland - Rutland Town Line," Boardman Hill Area, June 1994, Robert C. Krebs
- 58a. Letter from Dicovitsky, 6/8/94, to Clarendon Board of Selectmen and Planning Commission, Re: Failure of Notice to Town of Clarendon
- 58b. Letter from Dicovitsky to Bersaw, Clarendon Town Planning Commission, 6/30/94, Re: Request for Written Waiver of Rights Due to Failure of Notice
- 58c. Letter from Bersaw, 7/5/94, Re: Planning Commission and Selectmen Waive the Right to Timely Notice
- 59a. Letter from Kunin, 7/25/94, Re: Response to Recess Order #3
- 59b. Letter from Krebs, 7/22/94, Re: Distance from Quarterline Road to the Mapped School District Number 21
- 59c. Chronoflex, Towns of West Rutland - Rutland, 10/22/71, Project No. F020-1(11), Sheet B of I
60. Map, West Rutland, Sheet 34 of 72
61. Map, West Rutland, Sheet 35 of 72
62. Map, West Rutland - Rutland, 10/11/72, Project No. F020-1(11), Sheet No. F of I
63. "Memorandum Regarding Legal Standard Applicable to Determination of Whether Project is in West Rutland or Rutland," Kunin, 8/19/94
64. Maps for America, Third Edition, 1987 First Edition published in 1979 as A Centennial Volume, 1879-1979
65. West Rutland Real Estate Appraisal for the Years 1903, 1904, 1905, 1906
66. 1824 Town Meeting of the Town of Rutland
67. Bloomer's Response to Kunin's "Memorandum," "Opposition Memorandum Regarding Legal Standard Applicable to Criterion 10," 8/26/94
- 68a. Letter from Kunin, 8/25/94, Re: Response to District Commission's Request; Copies of Documents Presented at 8/19 Hearing, (Exhibits #65, 66 and typed version of 66)
- 68b. Notarized Copy of Exhibit 65, "West Rutland Real Estate Appraisal"
- 68c. Typed Version of Exhibit 66
- 68d. Notarized Copy of Exhibit 66

## CERTIFICATE OF SERVICE

I, Carmelita L. Brown, hereby certify that I sent a copy of the foregoing Findings of Fact, Conclusion of Law and Final Decision on Criterion 10 for Land Use Permit Application #1R0766 on September 9, 1994, by U.S. Mail, postage prepaid, to the following:

Atlantic Cellular Company,  
Attn: John Kelly  
15 Westminster Street  
Suite 830  
Providence, RI 02903

Charles W. & Richard C. Heleba  
P.O. Box 85  
Quarterline Road  
Center Rutland, VT 05736

Development Consultants, Inc.  
Attn: Gregory A. Dicovitsky  
175 Lower Judson Lane  
Stowe, VT 05672

Town of West Rutland  
Tom Yennerell, Town Manager  
P.O. Box 60  
West Rutland, VT 05777

West Rutland Planning  
Brian Harrington  
P.O. Box 115  
West Rutland, VT 05777

West Rutland Town  
Chester Brown, Jr. Chair  
Board of Selectmen  
P.O. Box 60  
West Rutland, VT 05777

Town of Rutland  
Rodney Gallipo  
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Center Rutland, VT 05736

Charles Brothers  
Rutland Town Planning  
RR #2 Box 8165  
Rutland, VT 05701

Joseph B. Zingale  
Administrative Assistant, Rutland Town  
P.O. Box 225  
Center Rutland, VT 05736

Ralph Austin  
Town of Clarendon  
P.O. Box 30  
North Clarendon, VT 05759

Clarendon Town Planning Commission  
Richard Bersaw  
P.O. Box 30  
North Clarendon, VT 05759

Rutland Regional Commission  
c/o Mark Blucher  
P.O. Box 965, The Opera House  
Rutland, VT 05702

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103 South Main Street  
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John H. & Judith W. Bloomer  
Boardman Hill  
West Rutland, VT 05777

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P. O. Box 668  
Rutland, VT 05702

Katie Adams  
Cumberland Blues Co. Inc.  
P.O. Box 6377  
Rutland, VT 05702

Kip Fry  
P.O. Box 89  
North Clarendon, VT 05759

Peter Kunin  
Downs, Rachlin & Martin  
P.O. Box 190  
Burlington, VT 05401

Richard Craig  
Cellular One  
3 Baldwin Avenue  
South Burlington, VT 05401

Frances Flynn  
1 Pleasant Street  
West Rutland, VT 05777

Gary Savoie  
Park Ave  
Claremont, NH 03743

John H. Bloomer, Jr.  
Anne Bloomer  
Castleton Road  
West Rutland, VT 05777

Tim Crossman  
Rutland Tribune  
98 Allen Street  
Rutland, VT 05701

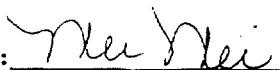
Robert Krebs  
Krebs & Lansing  
10 Main Street  
Colchester, VT 05446

J. Barry Burke  
McKinley Avenue  
Rutland, VT 05701

Marshall Fish  
Prospect Hill Road  
Rutland, VT 05701

Howard Burgess  
Center Rutland, VT 05736

Dated at Pittsford, Vermont, this 9th day of September, 1994.

By:   
Carmelita L. Brown  
District Office Chief Clerk

### FOR YOUR INFORMATION ONLY

Department of Public Service  
c/o Stuart Slote  
Energy Efficiency Division  
120 State Street  
Montpelier, VT 05620

State of Vermont  
ENVIRONMENTAL BOARD  
10 V.S.A. §§ 6001-6092

Re: Gary Savoie d/b/a WLPL  
and Eleanor Bemis

Land Use Permit Application  
#2W0991-EB (Reconsideration)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. BACKGROUND

The above-referenced matter comes before the Board on appeal from the decision of the District #2 Environmental Commission ("Commission") to grant Gary Savoie d/b/a WLPL and Eleanor Bemis ("Applicants") a land use permit pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Applicants were initially granted Land Use Permit #2W0991 by the District Commission on March 8, 1995. On April 5, 1995, two appeals were filed with the Environmental Board ("Board"): one by Sarah Ann Martin and the other by Edmund and Veronica Brelsford. The Board considered the appeals and on October 11, 1995, issued a decision denying the permit. For the Board's initial permit denial see Re: Gary Savoie, d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 11, 1995) ("Decision"). In the Decision, the Board declined to issue a land use permit because the proposed tower failed to comply with Criterion 10 of 10 V.S.A. §6086(a), with respect to the Windham Regional Plan ("Regional Plan").

Specifically, the Decision noted that the Applicants' application did not conform to the Regional Plan's policies to discourage construction of new communications facilities in favor of existing facilities. The Applicants were, therefore, informed with specificity of the sole reason for the Board's denial. In order to attempt to remedy the deficiency which led to the Board denial, the Applicants requested that the Commission reconsider their application. The request was timely filed pursuant to Environmental Board Rule ("EBR") 31(B) and sought to correct the deficiencies in the application which were the basis of the permit denial.

On May 24, 1996, the Commission issued its decision to grant the permit after review of the Applicants' request for reconsideration of the Decision ("Reconsideration Decision"). The Reconsideration Decision authorized the Applicants to construct a 110 foot communications tower on property including Bemis Hill in the towns of Athens and Rockingham in Windham County.

On June 20, 1996, Edmund and Veronica Brelsford ("Brelsforfs"), through their attorney, Gerald R. Tarrant, filed a Notice of Appeal with the Board along with a Statement of Issues, List of Witnesses, and Summary of Evidence. On June 24, 1996, Sarah Ann

Martin, through her attorney, Jonathon Bump, also filed a Notice of Appeal (Ms. Martin and the Brelsforas are collectively referred to herein as "Appellants"). On July 1, 1996, Applicants, through their attorney, Peter Van Oot, filed a cross-appeal in which they contend that the District Commission erred in granting party status to the Windmill Hill Pinnacle Association ("WHP Association"). Chair Ewing scheduled a prehearing conference in this matter for July 29, 1996.

On the eve of the scheduled conference, Mr. Tarrant and Mr. Van Oot contacted Chair Ewing to inform him that the parties had been working toward an informal resolution of the issues in controversy. Accordingly, the parties requested, and Chair Ewing granted, a 60 day postponement of the prehearing conference. Parties were directed to file a status memo in mid-September and advised to plan on a September 30, 1996 prehearing conference. On September 13, 1996, Applicants filed a letter through which Applicants and Appellants requested an additional 30 day postponement. Parties stated that they would use that time to review a Memorandum of Understanding circulating among the parties which was represented to provide the structure for mediating the issues on appeal. That postponement request was also granted, and a teleconference was tentatively scheduled for November 18, 1996, in the event that an informal resolution was not reached by the parties prior to that date.

On November 4, 1996, the parties, through Mr. Tarrant, informed the Board that while they sought to resolve the matter voluntarily, there were still some issues that required additional time and consideration by the parties. Parties again sought additional time. In order for the Board and its staff to become apprised of the progress made to date, and to schedule a hearing, Chair Ewing issued a formal notice of prehearing conference for November 18, 1996, to be held by telephone.

The following persons participated in the November 18 conference:

John T. Ewing, Board Chairman  
Edmund and Veronica Brelsford, by their attorney, Gerald R. Tarrant, Esq.;  
Sarah Ann Martin, and her attorney, Jonathon Bump, Esq.;  
Gary Savoie, and his attorney, Peter D. Van Oot, Esq.

## II. PRELIMINARY ISSUES

Three preliminary issues in dispute in this matter were identified in the written submissions of the parties and during the conference. They can be categorized as follows:

1. Party status of the Windmill Hill Pinnacle Association;

2. Whether, in addition to Policies 2 and 4, the Board should review compliance with Policy 5, to determine whether the Project conforms with the requirements of the Windham Regional Plan, and thereby complies with Criterion 10 of Act 250;
3. Whether the language of the telecommunications policies of the Windham Regional Plan addressing existing facilities and existing stations, includes only those facilities and stations which are specifically designed for the transmission of telecommunication or radio broadcast signals, or whether the terms "facilities" and "stations" should be interpreted more broadly to include other structures, including those not designed for telecommunications purposes, but which for some reason (height, prominence, proximity to transmitters, etc.) are aptly suited for the purpose of accommodating a broadcast transmitter, antennae, or the like.

Parties were provided an opportunity to brief these issues. Each party did so in considerable detail. Chair Ewing reviewed the written filings and ruled on each preliminary issue in the Prehearing Conference Report and Order ("Prehearing Order") dated January 9, 1997. The Prehearing Order is incorporated herein by reference, but for the purpose of continuity, those provisions which clarify the limited scope of review in this case will be repeated. Specifically, Sections II.A.2 and II.A.3 are repeated in their entirety below:

- [II.A.] 2. Whether, in addition to Policies 2 and 4, the Board should review compliance with Policy 5, to determine whether the Project conforms with the requirements of the Windham Regional Plan, and thereby complies with Criterion 10 of Act 250.

On reconsideration of a Board denial, the Commission properly limits its review to encompass only those aspects of the project or application which have been modified to correct deficiencies noted in the Board denial. EBR 31(B)(2). However, where circumstances warrant a more exhaustive review, due to project changes, different impacts, or new evidence, the Commission has the discretion to broaden its review. The Board Rules indicate that a finding on a criterion or issue in the prior permit proceeding shall be entitled to a rebuttable presumption of validity that the project, on reconsideration, remains in compliance therewith. See EBR 31(B)(2).

Applicants have requested that the scope of the hearing be limited to a review of Policies Number 2 and 4 of the Windham Regional Plan. They cite as one reason to so limit the inquiry, the fact that the Commission only

reviewed these two policies. Notwithstanding the language of EBR 31(B)(2), the Board is obligated to conduct its review of this matter *de novo*. Obviously, the review is limited in some respect to that aspect of the Project which was declared by the Board's October 11, 1995 denial to have been deficient. The Board acknowledges that it will review essentially the same types of evidence, and will address nearly the same limited issues as were addressed by the Commission. This does not, however, require the Board to use the same analytical approach, or review only that evidence which was presented to the Commission. Indeed, such inflexible constraints on the Board's review would inappropriately curb a thorough and meaningful *de novo* review.

Having acknowledged the Board's requirement of conducting the review *de novo*, the Chair nonetheless reads the language of EBR 31(B)(2) regarding the scope of the Commission's review on reconsideration - and the establishment of rebuttable presumptions - to be equally applicable to the Board's appellate review of a reconsidered decision. The burden of proof under criterion 10 is upon the Applicant. However, in view of the foregoing discussion of EBR 31(B)(2), and the Board's October 11, 1995 decision, the Board will presume the validity of its prior findings with respect to Policy 5 (See Decision at pp. 12-20, & 26). Therefore, while the Applicants retain their burden to prove compliance with Policies 2 and 4 of the Windham Regional Plan, the Appellants will carry the burden of proving by a preponderance that the Applicants have failed to comply with the requirements of Policy 5 of the Windham Regional Plan.

Accordingly, because a comprehensive review of compliance with Policies 2 and 4 of the Windham Regional Plan may require the Board to also consider Policy 5, the Board declines to limit the scope of its review to evidence addressing only Policies 2 and 4.

- [II.A.] 3. Whether the language of the telecommunications policies of the Windham Regional Plan addressing existing facilities and existing stations, includes only those facilities and stations which are specifically designed for the transmission of telecommunication or radio broadcast signals, or whether the terms "facilities" and "stations" should be interpreted more broadly to include other structures, including those not designed for telecommunications purposes, but which for some reason (height, prominence, proximity to transmitters, etc.) are aptly suited for the purpose of accommodating a

broadcast transmitter, antennae, or the like.

Chair Ewing concurs with the Applicants that the phrases "existing station" and "existing facility," as these occur in the Windham Regional Plan, should be accorded a plain meaning. Thus, without opining on precisely what constitutes an existing station or facility, the Board will apply the plain meaning of these terms - those communications structures that are already built. With respect to the issue of co-location, this reading provides a starting point for determining which structures ought to be considered for co-location purposes. An overly broad reading that interpreted this language to include such existing structures as water towers, steeples, or silos, would lead the Board down a path toward unnecessary confusion over the issue of what then constituted an existing structure.<sup>1</sup> Although Appellant Sarah Ann Martin correctly points out that the term "facilities" is not specifically limited to transmission and receiving stations, the Board will read such a limitation as the plain meaning of the language as used in Policies 2 and 4 of the Windham Regional Plan.

### III. THE EVIDENTIARY HEARING

On May 21, 1997, the Board convened a hearing in this matter in Grafton, Vermont. The following parties participated:

The Applicants by their counsel, R. Brad Fawley of Downs, Rachlin & Martin;  
Appellant Sarah Ann Martin, by her counsel, Jonathon Bump;  
Appellants Edmund and Veronica Brelsford, by their counsel, Gerald R. Tarrant; and  
The Windmill Hill Pinnacle Association by its representative, Beverly Major.

After commencing the hearing, the Board conducted a site visit to the proposed tower site, and to several locations from which the proposed tower would be visible. The Chairman described the site visit for the record and there were no objections to the Chair's description. Thereafter, the Board proceeded to hear testimony through cross-examination by the parties. Immediately following the consideration of evidence in this matter, the Board deliberated. The Board next deliberated on July 23, 1997 and again on August 13, 1997. This matter is

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With respect to mitigation of adverse aesthetic impacts, this analysis should not be read as discouraging the siting of transmission and receiving facilities on prominent "structures," whether previously existing or newly constructed, which blend more favorably with the surrounding human-built or natural environment.



now ready for a decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they have been considered and are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

#### IV. ISSUE

The sole issue in this proceeding is whether the Applicants have remedied those deficiencies in their proposed Project which were identified by the Board in its Decision. The specific focus of the Board's inquiry will be determining compliance with the Regional Plan, and in particular, with Policies 2, 4, and 5 of the Regional Plan. The only Act 250 criterion under appeal is Criterion 10.

#### V. FINDINGS OF FACT

##### General

1. Gary Savoie d/b/a WLPL and Eleanor Bemis, the owner of the proposed tower site, were issued Land Use Permit #2W0991 as co-permittees by the District #2 Environmental Commission on May 21, 1996.
2. The Applicants propose to construct and operate a 110 foot communications tower with an equipment shelter, emergency generator, access trail, and power line as ancillary improvements ("Project").
3. The stated purpose of the proposed tower is to broadcast the signal of a commercial FM radio station to the Walpole, New Hampshire area. The signal would be transmitted via frequency modulation (FM) radio waves.

##### Applicable Provisions of the Windham Regional Plan

4. The relevant policies of the Regional Plan, all of which pertain to the proper siting of communications facilities, follow:
  2. Encourage expansion of communications at existing transmission and receiving stations if such expansion is in the best public interest.
  4. Discourage the development of new sites for transmission and receiving stations in favor of utilizing existing facilities.
  5. Strongly encourage the siting and design of satellite dishes, radio towers, antennae and other transmission and receiving